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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Appellant,

v.

STALLONE LEVERETT,

Defendant and Respondent.

B287395

(Los Angeles County  
Super. Ct. No. YA093865)

APPEAL from an order of the Superior Court of Los Angeles County, Victor L. Wright, Judge. Reversed.

Jackie Lacey, District Attorney, Matthew Brown and John Pomeroy, Deputy District Attorneys, for Plaintiff and Appellant.

Nicole Davis Tinkham, Interim Public Defender, Albert J. Menaster and Dylan Ford, Deputy Public Defenders, for Defendant and Respondent.

## I. INTRODUCTION

The People appeal from an order granting a motion to dismiss a felony action. (Pen. Code<sup>1</sup>, § 1238, subd. (a)(8).) Defendant Stallone Leverett was charged with two felonies: driving under the influence of alcohol causing injury, in violation of Vehicle Code section 23153, subdivision (a), and driving with a blood alcohol content of .08 percent or higher and causing injury, in violation of Vehicle Code section 23153, subdivision (b). The incidents allegedly occurred on November 1, 2014. The People did not file a complaint until March 9, 2016. Defendant moved to dismiss the prosecution asserting, among other theories, a violation of his due process rights because of unreasonable preaccusation delay. (*People v. Nelson* (2008) 43 Cal.4th 1242, 1250.) The trial court granted the motion. The People contend defendant failed to demonstrate any preaccusation delay was prejudicial.<sup>2</sup> We agree with the People and reverse.

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The People also argue the trial court erred by granting the dismissal motion pursuant to section 1381. Defendant concedes and we agree that section 1381 does not provide for dismissal of this felony action because there was no evidence that defendant had served the People with a demand, and even if the People were deemed to have been served with defendant's demand on the date defendant sent his letter to the court clerk, defendant appeared within 90 days of that notice. (*People v. Gutierrez* (1994) 30 Cal.App.4th 105, 111.)

## **II. BACKGROUND**

On November 1, 2014, California Highway Patrol (CHP) officers responded to the scene of a four-car collision. A CHP report of the response to that accident states the following: An officer interviewed defendant, who admitted that he was driving one of the cars at the time of the accident. A passenger of one of the other cars also stated that he observed defendant exit from the driver's seat of a vehicle. An officer noticed the strong odor of alcohol emitting from defendant's breath and person. The officer asked defendant if he had consumed alcoholic beverages and defendant stated that he had. The officer then administered field sobriety tests. Defendant's performance on those tests was consistent with being under the influence of alcohol. The officer asked defendant to take a preliminary alcohol screening (PAS) test. Defendant agreed. The PAS showed a .16 and .14 percent blood alcohol content. The officer placed defendant under arrest and transported him to a police department, where defendant consented to complete a chemical test. The chemical test demonstrated that defendant had a .15 percent blood alcohol content.

On the date of the accident, an officer telephoned Joshua Alvarado, who stated that he had been in a vehicle stopped at a red light when a car with Arizona license plates (defendant's car) struck him from behind. On August 19, 2015, another officer called Joshua Alvarado as well as his passenger, Lucia Alvarado. Both Alvarados stated that they had sustained injuries and required physical therapy.

In March 2015, defendant was sentenced to prison in another criminal matter.

On March 9, 2016, the People filed a felony complaint, charging defendant with driving under the influence of an alcoholic beverage causing injury and driving with a .08 percent blood alcohol content causing injury. The People also alleged defendant had committed a prior serious or violent felony and was subject to sentencing pursuant to sections 667, subdivisions (b) through (j) and 1170.12. The trial court issued an arrest warrant on March 16, 2016.

On August 8, 2016, defendant was arraigned on the felony complaint in this case. Defendant entered a plea of not guilty and denied the special allegation.

On September 13, 2016, the probation department prepared a probation report, stating that a probation officer had attempted, unsuccessfully, to contact the Alvarados by telephone on September 5, 2016, and September 13, 2016.

On September 14, 2016, defendant made an oral motion to dismiss for lack of prosecution. The parties agreed to continue the matter to October 17, 2016, and then the matter was continued again to November 16, 2016, for a preliminary hearing and to permit defendant to file a “*Serna* motion.”<sup>3</sup>

On November 16, 2016, defendant filed a motion to dismiss for violation of his right to a speedy trial. Defendant also asserted that the delay in prosecution violated his due process rights. Defendant argued he was prejudiced by the delay because he lost the opportunity to be sentenced concurrently with the sentence he began serving in March 2015. Defendant also argued

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<sup>3</sup> *Serna v. Superior Court* (1985) 40 Cal.3d 239 (*Serna*), concerned a misdemeanor defendant’s motion to dismiss for violation of the right to a speedy trial and on due process grounds.

that the delay caused the memory of the witnesses to fade over time. In support of his motion, defendant submitted a declaration from his counsel, which stated that, “[b]ased on information and belief, [defendant’s] memory regarding the details of his arrest on the day of the alleged incident has been compromised.”

On December 29, 2016, the People filed their opposition. The People asserted that under the federal due process clause, preaccusation delay is prejudicial only if a defendant can demonstrate the state intentionally delayed in filing charges or there is no legitimate reason for the delay. They also asserted that any prejudice finding should be reserved for the trial court to determine during or after trial. The People did not object to defense counsel’s declaration or provide any explanation for the length of the delay.

The trial court heard defendant’s motion on November 1, 2017, and ruled as follows: “The court in this matter is going to grant the motion to dismiss the case, but the court’s order is not only for the 1381 issue, but also based upon the [*Serna*] issue. In the documents the court received in this matter, . . . the court believes that [defendant] has a valid argument both for the [*Serna*] issue as well as the 1381 demand. While the court does not . . . like this decision personally, the court feels compelled to make the decision based upon [defendant’s] inability to prepare for the case given the distance in time between the [incident] itself and the time the charges were brought, . . . [defendant] being in custody for a number of months. I think it was over a year before the charges were filed in this matter. Learning about the charges on a date near his release, based upon the declaration [by defense counsel] filed on

behalf of [defendant]. [¶] . . . [¶] In addition, the court sees it as being manifestly unfair if [defendant] is in custody in state prison, that he not be allowed to take advantage of the time that he spent in custody to dispose of this case, even if it meant a guilty plea where he could have served time concurrently on the matter. [¶] Accordingly, for all these reasons, the court will grant the motion to dismiss this matter on behalf of the defendant[.]”<sup>4</sup>

On November 1, 2017, the People refiled the charges against defendant in Case No. YA097135.<sup>5</sup> The case was assigned to a different bench officer. Defendant moved to dismiss the refiled charges, arguing that the prior trial court had dismissed the action for preaccusation delay and thus the People could not refile. (*People v. Boysen* (2007) 165 Cal.App.4th 761, 777; *People v. Pinedo* (2005) 128 Cal.App.4th 968, 973.) On December 27, 2017, the trial court in Case No. YA097135 determined that the prior trial court had dismissed the felony action on constitutional due process grounds, citing the prior court’s use of the language “manifestly unfair,” and thus dismissed with prejudice. That same date, the People filed an appeal from the prior trial court’s order of dismissal.

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<sup>4</sup> The People complain that the trial court “held merely a brief hearing in which it received no evidence, and pointed to no specific ways in which [defendant]’s ability to defend himself at trial had been compromised.” That the trial court received no evidence was due, in part, to the People’s decision not to submit any evidence in support of its opposition or cross-examine or otherwise challenge the credibility of defendant’s proffered evidence.

<sup>5</sup> We grant defendant’s motion to augment the record with the documents related to Case No. YA097135.

### III. DISCUSSION

A delay between the time a crime is committed and the filing of a formal accusation or an arrest may violate a defendant's right to a fair trial and due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 15 of the California Constitution. (*People v. Catlin* (2001) 26 Cal.4th 81, 107; *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 505.) Due process protects an accused's interest in fair adjudication by preventing unjustified delays that can weaken the defense, such as the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence. (*People v. Martinez* (2000) 22 Cal.4th 750, 767.)

Under California law, whether the delay is negligent or intentional, a defendant seeking to dismiss a charge on due process grounds must first demonstrate prejudice arising from the delay. (*People v. Abel* (2012) 53 Cal.4th 891, 908; *People v. Catlin, supra*, 26 Cal.4th at p. 107.) Whether a delay is prejudicial is a factual question, which is reviewed for substantial evidence. (*People v. Hill* (1984) 37 Cal.3d 491, 499; accord, *People v. Alexander* (2010) 49 Cal.4th 846, 874.) If a defendant demonstrates prejudice, the burden shifts to the prosecution to justify the delay, and the court next balances the harm to the defendant against the justification for the delay. (*People v. Abel, supra*, 53 Cal.4th at p. 909; *People v. Catlin, supra*, 26 Cal.4th at p. 107.) We review the trial court's decision to dismiss based on preaccusation delay for abuse of discretion. (*People v. Boysen, supra*, 165 Cal.App.4th at p. 781; *People v. Pinedo, supra*, 128 Cal.App.4th at p. 975.)

As a preliminary matter, defendant contends that the People, by failing to object to the declaration in the trial court, have waived any objection to the declaration on appeal.<sup>6</sup> We agree that a party forfeits a challenge to the competency of evidence by failing to object. “It is elementary law that incompetent statements in [a declaration] become competent evidence when admitted without objection . . . ‘Even conceding that many of the averments of the [declaration] are conclusions or hearsay, they became competent evidence for the reason that they were admitted without objection.’” (*Vartanian v. Croll* (1953) 117 Cal.App.2d 639, 647-648.) “Ordinarily, a court cannot commit error in the admission of evidence unless it is called upon to *rule* on an *objection* by a party. (See Evid. Code, § 353, subd. (a).)” (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1208.) The People thus forfeited any objection to the declaration as being based on hearsay or lacking in personal knowledge. But the People did not forfeit their challenge to the sufficiency of the declaration to demonstrate prejudice, as a party can raise such a challenge for the first time on appeal. (*People v. Butler* (2003) 31 Cal.4th 1119, 1126; *People v. Viray, supra*, 134 Cal.App.4th at p. 1217.) Accordingly, we consider whether there was sufficient evidence to support the trial court’s finding of actual prejudice.

We conclude there was not. As a general matter, faded memory caused by the lapse of time can constitute prejudice. (*People v. Abel, supra*, 53 Cal.4th at p. 908; *People v. Martinez, supra*, 22 Cal.4th at p. 767; *Ibarra v. Municipal Court* (1984) 162 Cal.App.3d 853, 858.) But merely asserting that a person has

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<sup>6</sup> The declaration was not signed by counsel. But the People do not challenge the lack of signature on appeal and did not object in the trial court.



lack of memory is insufficient to demonstrate prejudice. “Lack of recall may establish prejudice, but only on a showing that the memory loss persists after reasonable attempts to refresh recollection. ‘The showing of actual prejudice which the law requires must be supported by particular facts and not . . . by bare conclusionary statements.’ (*Crockett v. Superior Court* [(1975)] 14 Cal.3d 433, 442.)” (*Serna, supra*, 40 Cal.3d at p. 250.)

Our review of cases that consider whether a defendant has demonstrated actual prejudice indicates the evidence here was insufficient. In *People v. Sahagun* (1979) 89 Cal.App.3d 1, the Court of Appeal found a declaration from the defendant’s counsel was insufficient to show actual prejudice for preaccusation delay: “Counsel for defendant . . . executed a declaration, but its entire substance was no more than vague, general and conclusory statements to the effect that some unstated number of unidentified witnesses whom interviews revealed had ‘highly exculpatory testimony’ favorable to defendant . . . ‘appear to be unavailable’ and ‘reportedly are out [of] the court’s jurisdiction,’ that ‘certain evidentiary leads’ pursued by counsel’s office, exculpatory in nature, were ‘no longer available’ ‘[as] a result of circumstantial changes occurring during the last 12 months,’ and that counsel was informed and believed ‘that certain evidence formerly available to the defendants has been destroyed which would have been exculpatory in nature. . . .’ These vague assertions did not inform the court of the nature of any evidence destroyed, the identity of the ‘unavailable’ witnesses, the nature of what their testimony would have been, when they became unavailable, or what efforts were made by the defendants to locate them or adduce equivalent testimony or evidence; nor did they disclose any facts indicating that these witnesses or this

evidence would have been available had criminal proceedings been reinstituted within a short time—that is, that the loss of evidence and unavailability of witnesses was caused by the prosecutorial delay. Thus, the declaration of counsel was entirely inadequate to support a conclusion that the defendants were substantially prejudiced by the prosecutorial delay.” (*Id.* at pp. 23-24.)

Our Supreme Court in *People v. Abel, supra*, 53 Cal.4th 891, found a defendant, who presented far more evidence than defendant here, had failed to demonstrate he was prejudiced by preaccusation delay. The defendant claimed that a witness could not remember specific dates to support his case, but made no showing that the witness’s recall would have been more specific if contacted earlier. (*Id.* at p. 909.) The defendant also complained that the delay caused the memory of another witness to fade, but the Supreme Court again disagreed, finding that the record indicated both the defendant and the witness had detailed recall of the event in question. (*Ibid.*) The defendant finally asserted the delay rendered him unable to obtain telephone records, but he did not show that additional records would have been obtained if the investigation had proceeded more quickly, or that he could not have obtained the records himself. (*Id.* at p. 910.)

The Court of Appeal in *Ibarra v. Municipal Court, supra*, 162 Cal.App.3d 853 observed that the evidence in support of demonstrating prejudice must be non-conclusory: “We agree that mere allegations ‘I was prejudiced’ would be insufficient to shift the burden of going forward with evidence.” (*Id.* at p. 858.)

That is just the type of allegation that defendant proffered here. Defendant’s counsel declared on information and belief that “[defendant’s] memory regarding the details of [defendant’s]

arrest on the day of the alleged incident has been compromised.” The declaration does not explain which details of defendant’s memory had been impaired. The declaration did not, for instance, specify that defendant could not recall relevant details, such as how the car accident occurred, rather than irrelevant details, such as the color of the uniform that the officer who administered the field sobriety test wore.<sup>7</sup> Further, there is no evidence that defendant’s “memory loss persists after reasonable attempts to refresh recollection.” (*Serna, supra*, 40 Cal.3d at p. 250.) For example, there was no evidence that defendant reviewed the CHP report but still could not remember salient facts. Defendant asserted in his motion to dismiss that the delay in prosecution compromised the memory of potential witnesses. Yet other than the undisputed fact that time had passed from the date of the incident to the date of the charges against him, defendant submitted no evidence in support of such an assertion. On this record, defense counsel’s conclusory statement about defendant’s compromised memory is insufficient to support a finding that defendant was actually prejudiced by the preaccusation delay. Accordingly, the trial court erred by granting the motion to dismiss the action.

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<sup>7</sup> By contrast, the defendant in *Ibarra v. Municipal Court, supra*, 162 Cal.App.3d at page 856, declared that he no longer remembered the details of the conversation that led to his arrest. The Court of Appeal found that the defendant’s declaration was sufficient to demonstrate prejudice. (*Id.* at p. 858.)

#### IV. DISPOSITION

The order is reversed, and the cause is remanded for further proceedings consistent with this opinion.

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KIM, J.

We concur:

BAKER, Acting P. J.

SEIGLE, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.